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No. 88-1206

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

DELTA TRUCK & TRACTOR, INC.,

Petitioner,

Versus

J. I. CASE COMPANY, TENNECO INC., and NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION (Formerly International Harvester Company),

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether a plaintiff asserting a claim arising under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") must allege the existence of a RICO enterprise which is separate and apart from the alleged pattern of racketeering activity, as required by *United States v. Turkette,* 452 U.S. 576 (1981).

PARTIES

The caption of the case in this Court contains the names of all parties. (Supreme Court Rule 21.1(b)).

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COUNTER-STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

Respondent J. I. Case Company ("Case"), is a wholly-owned subsidiary of Respondent Tenneco Inc. ("Tenneco"). Respondent Navistar International Transportation Corporation was, until recently, known as the International Harvester Company ("International Harvester"). In November of 1984, Case and Tenneco agreed to acquire certain of the assets of International Harvester's farm equipment business. Prior to the sale, both Case and International Harvester were manufacturers of farm implements and agricultural equipment, each marketing their competing lines through a network of independent Case or International Harvester dealers.[1] Petitioner Delta Truck and Tractor, Inc. was an International Harvester dealer.

As a result of the crisis in the farm economy which began during the 1981 recession, the businesses of virtually every manufacturer of agricultural equipment suffered serious and substantial misfortunes during the early 1980s. International Harvester, in particular, suffered ruinous losses during this period, and in 1984, it decided to withdraw from the agricultural equipment business altogether. Early in 1985, it completed the sale of certain of its assets to Case and Tenneco. After the acquisition, Case began to manufacture and sell a new and broader line of agricultural equipment under the trade names "Case-IH" or

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[1]Case also sold equipment directly through company-owned stores. Most Case dealers carried other lines of equipment; International Harvester dealers generally carried only International Harvester products.

"Case-International." International Harvester was no longer in the farm equipment business.

Case determined that it would offer Case-International dealership agreements to many of its existing dealers and to many existing International Harvester dealers. In making this determination, however, Case identified more than 400 areas around the country where a Case dealer and an International Harvester dealer were in such close proximity that it would be virtually impossible for both of them to become successful Case-International dealers. In these "conflict" areas, Case elected to extend a new Case-International dealership agreement to only one of the two dealers. Every effort was made to select the dealer who would be the most effective and successful representative of Case in a highly competitive business. There was no favoritism. Case offered more than 300 International Harvester dealers in conflict areas new "Case-International" dealership agreements; the Case dealers in those conflict areas were not offered new contracts, and their existing dealership agreements were terminated subject to the notice provisions of their contracts with Case.

Case determined that Petitioner and Scott Truck and Tractor, a Case dealer, were in a conflict area. After a careful evaluation of the situation, it was decided not to extend a new Case-International dealership agreement to Petitioner. The Asset Purchase Agreement among Case, Tenneco and International Harvester did not require Tenneco or Case to assume International Harvester's obligations to its independent dealers. Thus, Case did not "terminate" the dealership agreements of International

Harvester dealers, such as Petitioner, who were not selected. Case simply declined to offer them a Case-International dealership agreement. Since International Harvester was no longer in the farm equipment business, those former International Harvester dealers who were not selected no longer had access to International Harvester tractors, farm implements or repair parts. Petitioner subsequently became a dealer for Ford and, later, for Massey Ferguson.

The Asset Purchase Agreement among Tenneco, Case, and International Harvester required Case to offer International Harvester dealers who were not selected an appropriate arrangement for the consolidation, relocation, purchase or termination of their operations on terms at least as favorable as they would have been entitled to receive under their dealership contract with International Harvester. Case attempted to negotiate appropriate buy-out arrangements with dealers who were not selected. In the vast majority of these cases, its efforts to negotiate a fair and reasonable settlement with exiting dealers were successful. Although a good faith effort was made to negotiate such a settlement agreement with Petitioner, no agreement was reached. This litigation followed. In addition to the claim that Respondents have engaged in racketeering activity, Petitioner has charged them with breach of contract; bad faith; third-party beneficiary breach of contract; breach of fiduciary duty; breach of implied covenants; fraud; and a variety of antitrust violations and unfair trade practices. Those claims remain pending before the United States District Court for the Western District of Louisiana.

B. THE DECISIONS BELOW.[2]

The original complaint was amended twice in an effort to state a RICO claim. Petitioner's Eleventh Cause of Action, which attempts to set forth its RICO claim, consists of twenty-three typewritten pages, and contains numerous and detailed allegations of facts. Respondents moved to dismiss Petitioner's RICO claim on the ground that the facts alleged therein did not properly set forth a claim on which relief could be granted. The district court granted Respondents' motion. Having thoroughly reviewed Petitioner's lengthy and detailed RICO allegations, the district court concluded that the RICO "enterprise" alleged by Petitioner was an "association-in-fact" of Tenneco, Case and International Harvester, formed for the limited purpose of accomplishing the selection of new Case International dealers.

> The plaintiff contends that the named defendants, International Harvester, Case, and Tenneco, participated in an "association in fact" to perform the various acts outlined in plaintiff's Original, First Amended and Second Amended Complaints. However, the enterprise must be "an entity separate and apart from the pattern of activity in which it engages." *Turkette*, 452 U.S. at 583, 101 S.Ct. at 2529, 69 L.Ed.2d at 255.
>
> The plaintiff has failed to sufficiently allege any facts to establish a "separate" existence. Rather, it appears from the plaintiff's pleadings that the as-

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[2]The decision of the United States Court of Appeals for the Fifth Circuit is reported at 855 F.2d 241 (5th Cir. 1988), and reproduced in Petitioner's Appendix at 31. The district court's opinion is unreported. It is reproduced in Respondents' Appendix at 1.

> sociation of the various corporate defendants and their employees was specifically related to the corporate acquisition and merger of International Harvester by Case and Tenneco. Thus, the only connection among the corporate defendants in this case forms the core facts of the alleged fraudulent activity. As noted in *Turkette*, supra, the "enterprise" must have an existence apart from the alleged acts of racketeering. Thus, we find that the plaintiff's First and Second Amended Complaints fail to establish a claim upon which relief can be granted.

Resp. App. at 6-7. The district court alternatively held that the allegations in Petitioner's complaint referred to a single transaction, and that alleged instances of mail and wire fraud in connection with a single transaction could not establish a pattern of racketeering activity. Resp. App. at 5.

The court of appeals, contrary to the district court's opinion, held that Petitioner had properly alleged a pattern of racketeering activity. The controlling Fifth Circuit precedent on the RICO "pattern" requirement is set forth in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985). The *R.A.G.S.* decision holds that a pattern of racketeering activity may be established by pleading two related predicate crimes, even where the challenged conduct constitutes an isolated scheme or a single criminal episode. The court of appeals concluded that Petitioner's complaint did satisfy the *R.A.G.S.* requirement, and the district court's opinion thus was not affirmed on "pattern" grounds.

The court of appeals further held, however, that the facts alleged in Petitioner's complaint failed to establish a continuing "association-in-fact" enterprise that was

separate and apart from the pattern of racketeering activity.

> We have incorporated this notion of continuity into our definition of such enterprises. An association-in-fact enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure. *Manax v. McNamara,* 842 F.2d 808, 811 (5th Cir. 1988); *Foval v. First Nat'l Bank of Commerce,* 841 F.2d 126, 129-30 (5th Cir. 1988); *Montesano v. Seafirst Commercial Corp.,* 818 F.2d 423, 426-27 (5th Cir. 1987); *Atkinson v. Anadarko Bank & Trust Co.,* 808 F.2d 438, 440-41 (5th Cir.), *cert. denied,* — U.S. —, 107 S.Ct. 3276, 97 L.Ed.2d 780 (1987); *Shaffer v. Williams,* 794 F.2d 1030, 1032 (5th Cir. 1986). Thus, the enterprise must not be one that briefly flourishes and fades. It must be one that, in the words of *Turkette,* "functions as a continuing unit." 452 U.S. at 583, 101 S.Ct. at 2528.

855 F.2d at 243-44, Pet. App. at 41-42.

The court concluded that Petitioner had not alleged such an enterprise, had not alleged that Respondents' conduct posed a continuing threat of criminal activity and, relying on *U.S. v. Turkette,* 452 U.S. 576 (1981), affirmed the district court's decision.

C. REASONS FOR DENYING THE WRIT.

1. The courts below merely applied well-established precedent.

The courts below merely applied well-established precedent on the question of the RICO enterprise as set forth in *United States v. Turkette, supra.*

> The enterprise is an entity, for present purposes a group of persons associated together for a common

> purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961 (1) (1976 Ed., Supp. III). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. *The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages."*

452 U.S. at 583 (emphasis added) Petitioner does not claim that the courts below departed from the well-established rule that, for purposes of deciding a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the allegations of the complaint must be accepted as true, and all inferences from the facts alleged must be drawn in favor of the plaintiff. *Conley v. Gibson,* 355 U.S. 41 (1957). *See* Pet. App. at 35; Resp. App. at 3. Having applied this standard to Petitioner's lengthy and detailed RICO allegations, the courts below concluded that the Complaint did not allege a RICO enterprise separate and apart from the pattern of racketeering activity. This Court's decision in *U.S. v. Turkette, supra,* therefore requires that Petitioner's complaint be dismissed.

2. Denial of the Petition need not be deferred pending resolution of the "pattern" cases presently before the Court.

As Petitioner correctly points out, there are cases pending before this Court which may provide an oppor-

tunity to further explain what conduct constitutes a "pattern of racketeering activity" for RICO purposes. *See, e.g., H. J. Inc. v. Northwestern Bell Telephone Co.,* No. 87-1252 (argued November 8, 1988).

Respondents argued below that Petitioner's complaint failed to allege a pattern of racketeering activity because the specific predicate crimes alleged were in furtherance of a single scheme. The court of appeals did not agree. Rather, it reluctantly endorsed the most liberal definition of pattern available, holding that a pattern of racketeering activity could be established by proof of only two predicate acts in furtherance of a single scheme. Pet. App. at 40-41. This Court's decision in any of the pending "pattern" cases, regardless of the outcome, will provide no basis for reversing the court of appeals, which applied the least restrictive definition of pattern, but dismissed the complaint on entirely separate "enterprise" grounds.

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CONCLUSION

The decisions of the courts below were in accord with well-established precedent on the issue of the RICO "enterprise", and this case therefore raises no novel, important or controversial question of law. The Petition should be denied.

Dated this 22nd day of February, 1989.

Respectfully submitted

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA ALEXANDRIA DIVISION

DELTA TRUCK & TRACTOR, INC.	)	CIVIL ACTION
-vs-	)	
J. I. CASE COMPANY, ET AL	)	NO. 85-2606

RULING

(Filed April 9, 1987)

This matter is now before us on plaintiff's, Delta Truck & Tractor, Inc. (Delta) Motion for Leave to File a Second Amended Complaint, and defendants', J. I. Case Company, Tenneco, Inc., and International Harvester Company, Motion to Dismiss filed on February 28, 1986, as well as the defendants' 12(b)(6) Motion to Dismiss in relation to the plaintiff's Second Amended Complaint.

We hereby grant the plaintiff leave to file its Second Amended Complaint pursuant to Fed. R. Civ. P. 15(a). Fed. R. Civ. P. 15(a) provides that leave to amend "shall be freely given when justice so requires." Ordinarily, when the amendment will not prejudice the other side due to untimeliness, the motion should be allowed. *See, Bamm, Inc. v. GAF Corporation,* 651 F.2d 389 (5th Cir. 1981). The plaintiff's Second Amended Complaint merely adds detail and factual clarity to the plaintiff's First Amended Complaint and the substantive claims under the Racketeer Influenced and Corrupt Organization provisions of Title 9 in the Organized Crime Control Act, 18 U.S.C. § 1961

et seq., (hereinafter RICO). Therefore, we grant the plaintiff leave to file the Second Amended Complaint.

Next, as to the defendants' original Motion to Dismiss filed on February 28, 1986, all but one of the defendants' arguments is moot. Originally, the defendants made three arguments in the Motion to Dismiss. First, the defendants argued that the RICO claim should be dismissed against the individual defendants due to a lack of personal jurisdiction and improper venue. The arguments and Motion to Dismiss as to the individual defendants are now moot because the parties entered into a stipulation on August 26, 1986 dismissing the complaint against all individual defendants.

Second, the defendants argued that the plaintiff failed to plead with sufficient particularity under Fed. R. Civ. P. 9. This matter is also moot, however, because the defendants have in their opposition to the Second Amended Complaint withdrawn the objections based on Fed. R. Civ. P. 9.

Third, in the original Motion to Dismiss defendants contended that the plaintiff had failed to state a claim upon which relief could be granted pursuant to Fed. R. Civ. P. 12(b)(6). In the defendants' Opposition to the Second Amended Complaint, defendants retain and reiterate their objections to the First and Second Amended Complaints based upon Fed. R. Civ. P. 12(b)(6).

Because defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) has been reurged in defendants' Opposition to the Second Amended Complaint, we will treat the defendants' Opposition to the Second Amended

Complaint as a renewed 12(b)(6) Motion to Dismiss the plaintiff's eleventh cause of action asserting a claim under RICO. Essentially, the defendants contend that plaintiff has failed to allege either a "pattern of racketeering activity," or, an "enterprise." Both of these elements are prerequisites for a claim under RICO. 18 U.S.C. § 1961, 1962.

In determining whether to dismiss a complaint pursuant to Fed. R. Civ. P. 12(b)(6), this court must read a complaint as a whole, accepting material allegations and drawing all inferences in favor of the plaintiff. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). Although it is necessary to plead all of the elements of a RICO violation within the complaint, a complaint will be sufficient as long as it meets the "liberal notice-pleading procedure of the Federal Rules of Civil Procedure, and of *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)." *Mitsubishi Aircraft Internat'l, Inc. v. Brady,* 780 F.2d 1199 (5th Cir. 1986).

In plaintiff's First Amended Complaint, plaintiff asserted a cause of action under the civil RICO provisions, 18 U.S.C. § 1964(c). The provisions of § 1964(c) apply only when a violation of § 1962 has been alleged. This section provides that a "pattern of racketeering activity" is unlawful only if (a) the challenged conduct provides income which is used to acquire an interest in an "enterprise"; (b) the challenged conduct is used to require or maintain an interest in an "enterprise"; or (c) the challenged conduct is used to participate in conduct in or conduct the affairs of an "enterprise." The defendants in the case at bar contend that the plaintiff has failed to

allege either a "pattern or racketeering activity", or an "enterprise."

Substantively, 18 U.S.C. § 1961(5) provides that to constitute a "pattern" it "requires at least two acts of racketeering activity . . . ." RICO also defines "racketeering activity" to include, among other things, any act "indictable" under numerous federal criminal provisions, including mail and wire fraud. 18 U.S.C. § 1961(1)(B).

The plaintiff contends that the defendants made use of the United States mails to implement a scheme to defraud some 400 dealers of their businesses and various assets in "conflict areas". In particular, the plaintiff contends that this scheme arose in connection with Tenneco and Case's acquisition of the International Harvester agricultural equipment business, which constituted one event in the alleged "pattern of racketeering activity" by which Tenneco and Case acquired dealerships and dealership assets from numerous terminated dealers across the United States.

In *Sedima, S.P.R.L. v. Emrex Co.*, — U.S. —, 105 S.Ct. 3275 (1985), the Supreme Court explained that

> "The legislative history [of RICO] supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: 'The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than the 'racketeering' activity and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.' " [citation omitted] (emphasis added). 105 S.Ct. at 3285, n. 14.

Ordinarily, two or more acts which occur in the course of a single criminal episode do not constitute a "pattern of racketeering activity." *See, Northern Trust Bank/ O'Hare v. Inryco, Inc.*, 615 F. Supp. 828 (N.D. Ill. 1985); *Richter v. Sudman*, 634 F. Supp. 234 (S.D. N.Y. 1986). In *Fleet Management Systems, Inc. v. Archer-Daniels-Midland Co.*, 627 F. Supp. 550 (C.D. Ill. 1986), the court explained that: "An isolated criminal episode, though accomplished through a number of fraudulent acts, does not evidence such a threat of continuing criminal activity." However, the Fifth Circuit in *R.P.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), has stated that two "related" acts of mail fraud could constitute a pattern of racketeering activity. But, the court in *Hyatt, supra*, failed to offer any explanation or analysis for its statement. Additionally, the Court later stated in *Armco Industries Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 481 (5th Cir. 1986), that the "pattern of racketeering activity" language in the RICO statute is something that must be interpreted in "the future."

All the allegations in the plaintiff's First and Second Amended Complaint refer to a single transaction—the Case and Tenneco acquisition of International Harvester's agricultural equipment business and its related efforts to stabilize the combined dealer network. The alleged repeated violations of mail fraud within the plaintiff's First and Second Amended Complaint in furtherance of this business endeavor or scheme cannot suffice to establish a "pattern of racketeering activity."

Nevertheless, assuming that the plaintiff's complaint did allege sufficient facts to establish a "pattern of racke-

teering activity", the plaintiff has failed to allege an "enterprise."

Although § 1961(4) does not provide an exact definition of "enterprise," the term does include partnerships, corporations, associations, and other legal entities, as well as groups of individuals "associated in fact." Despite the ambiguities within the statute itself, in order to properly plead a violation of the RICO statute, a plaintiff must allege an "enterprise" that is "separate and apart" from the challenged racketeering activity. *United States v. Turkette,* 452 U.S. 576, 583 (1981). Furthermore, the "persons" charged with violating the statute must be different from the "enterprise." *Bennett v. Berg,* 685 F.2d 1053 (8th Cir. 1982); *Schreiber Distributing v. Serve-Well Furniture Co.,* 806 F.2d 1393 (9th Cir. 1986). *But see, United States v. Hartley,* 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied,* 459 U.S. 1183, 103 S.Ct. 834, 74 L.Ed.2d 1027 (1983), ("a corporation may be simultaneously both a defendant and the enterprise" under § 1962(c)).*

The plaintiff contends that the named defendants, International Harvester, Case, and Tenneco, participated in an "association in fact" to perform the various acts outlined in plaintiff's Original, First Amended and Second Amended Complaints. However, the enterprise must be "an entity separate and apart from the pattern of activity in which it engages." *Turkette,* 452 U.S. at 583, 101 S.Ct. at 2529, 69 L.Ed.2d at 255.

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* This finding was made strictly on the ground that the Court had been furnished no authority holding that a corporation could not be found to be in a dual capacity.

The plaintiff has failed to sufficiently allege any facts to establish a "separate" existence. Rather, it appears from the plaintiff's pleadings that the association of the various corporate defendants and their employees was specifically related to the corporate acquisition and merger of International Harvester by Case and Tenneco. Thus, the only connection among the corporate defendants in this case forms the core facts of the alleged fraudulent activity. As noted in *Turkette, supra,* the "enterprise" must have an existence apart from the alleged acts of racketeering. Thus, we find that the plaintiff's First and Second Amended Complaints fail to establish a claim upon which relief can be granted.

Alternatively, we also find that the plaintiff has failed to identify an "enterprise" which is sufficiently distinct of the "persons" charged with violating the statute. It is clear that the defendants may not simultaneously be considered the "enterprise" and the "person" who conducts the affairs of the enterprise through a pattern of racketeering activity. *See, e.g., Bennett v. United States Trust Co.,* 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied,* 106 S.Ct. 800, 88 L.Ed. 2d 776 (1986); *B. F. Hirsch v. Enright Refining Co.,* 751 F.2d 628, 634 (3rd Cir. 1984); *Harrico, Inc. v. American National Bank & Trust Co.,* 747 F.2d 384, 400 (7th Cir. 1984), *aff'd on other grounds,* 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985); *Rae v. Union Bank,* 725 F.2d 478, 581 (9th Cir. 1984); *United States v. Computer Sciences Corp.,* 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied,* 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983). *But see, United States v. Hartley,* 678 F.2d 961, 987-90 (11th

Cir. 1982), *cert. denied,* 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983).**

Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is hereby GRANTED and the plaintiff's Eleventh Cause of Action asserting a claim under RICO in both the First and Second Amended Complaint is hereby DISMISSED.

DONE AND SIGNED at Alexandria, Louisiana, this 8th day of April, 1987.

/s/ Nauman S. Scott
UNITED STATES DISTRICT JUDGE

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* We further note that Plaintiff's pleadings also fail to identify or characterize the alleged "enterprise." Instead, the First Amended Complaint, as well as the Second Amended Complaint, merely aver the existence thereof. It is inconsistent, even with the liberal notice pleading of the federal rules, to allow such deficiencies.